

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
JERRY FISHER, :  
OFFICER OF BOSS HOLDING CORP. :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period March 1, 1985 :  
through February 28, 1988. :

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In the Matter of the Petition :  
of :  
BERNARD MYERS, :  
OFFICER OF BOSS HOLDING CORP. :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period March 1, 1985 :  
through February 28, 1988. :

DETERMINATION  
DTA NOS. 808579,  
808583 AND  
808708

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In the Matter of the Petition :  
of :  
EVERETT YAGUD, :  
OFFICER OF BOSS HOLDING CORP. :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period March 1, 1985 :  
through February 28, 1988. :

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Petitioners, Jerry Fisher, 104 Stillman Avenue, Bergen Field, New Jersey 07621, Bernard Myers, 149 Amsterdam Avenue, Passaic, New Jersey 07055, and Everett Yagud, 3812 Laurel Lane, Bedford, Texas 76021, officers of Boss Holding Corp., filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for

the period March 1, 1985 through February 28, 1988.

A consolidated hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 16, 1991 at 1:15 P.M., with all submissions and briefs submitted by January 17, 1992. Messrs. Fisher and Myers appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

On January 15, 1992, the Division of Taxation by its representative, William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel), and on May 1, 1991, petitioner Everett Yagud, appearing pro se, agreed to have the controversy determined on submission without hearing. All submissions were received by January 17, 1992. After due consideration of the record in this matter, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following consolidated determination with regard to all three officers of Boss Holding Corp.

#### ISSUES

I. Whether the Division of Taxation properly found that petitioners, in their capacities as officers of Boss Holding Corp., were persons required to collect tax pursuant to Tax Law § 1131(1) and personally liable for the tax imposed, collected or required to be collected under Article 28 of the Tax Law pursuant to Tax Law § 1133(a) for the period March 1, 1985 through February 28, 1988.

II. If petitioners are found to be liable for the tax assessed, whether certain payments have been paid and applied toward the assessments of tax against Boss Holding Corp.

#### FINDINGS OF FACT

The Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 28, 1989, to Jerry Fisher, as an officer of Boss Holding Corp. for the period March 1, 1985 through February 28, 1988 which set forth total tax due of \$393,339.52, plus penalty and interest. The Division also issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due on the same date to Mr. Fisher for omnibus penalty pursuant to Tax Law § 1145 in the sum of \$38,174.46. On

February 28, 1989, the Division of Taxation issued a Notice of Assessment Review with regard to the above assessments modifying the tax due and reducing the sum to \$103,149.93, plus penalty and interest. Following a conciliation conference on February 5, 1990, a second Notice of Assessment Review, dated June 27, 1990, cancelled the omnibus penalty in the sum of \$38,174.46. Therefore, the amount remaining in issue is the adjusted tax due of \$103,149.93, plus penalty and interest.

The Division of Taxation also issued notices of determination and demands for payment of sales and use taxes due to Bernard Myers and Everett Yagud, as officers of Boss Holding Corp., all notices dated February 28, 1989. The amounts stated on said notices were identical to those set forth on the notices sent to Jerry Fisher, as set forth in Finding of Fact "1".

Notices of assessment review, dated February 28, 1989, were issued to both Mr. Myers and Mr. Yagud reducing the amount of tax due to \$103,149.93, plus penalty and interest. Following a conciliation conference on February 5, 1990, omnibus penalty assessed against both Mr. Myers and Mr. Yagud was cancelled by a second set of notices of assessment review dated June 27, 1990. Therefore, as in the case of Mr. Fisher, the amount in issue with regard to both Mr. Myers and Mr. Yagud is \$103,149.93, plus penalty and interest.

The underlying audit in this matter, which yielded the assessments against the corporation and its alleged officers, was not challenged herein. Briefly, the tax due was based upon disallowed nontaxable sales for which no exemption certificates were made available. Additional taxes were found due on assets acquired and expense purchases made.

Boss Glass Industries, Inc./Boss Holding Corp. made flat glass products, mirrors, curved auto glass and colored glass products.

#### Matter of Jerry Fisher

Mr. Fisher was one of the principals in a predecessor corporation called Boss Auto Glass Distributors. That entity was sold in June 1984 to another corporation, purportedly Page Mill Intercapital Corporation, which continued operations of the business as Boss Holding Corp., Federal employer identification number 22-2536737, with an address at 321 Change Bridge

Road, Pine Brook, New Jersey, and doing business as Boss Glass Industries. The chief investor in the corporation was one Michael Gibbs.

Mr. Fisher denied that he had ever been an officer with Boss Holding Corp. and that his position was as a salesman, calling customers, checking on sales, collections and receivables. He was also called upon to determine the credit of various customers. Although he claimed he did not have check-signing authority, Mr. Myers testified that he did.

Mr. Fisher conceded that he had been an officer in Boss Auto Glass Distributors, the predecessor corporation, acting as secretary and treasurer, and received approximately \$2,000.00 per week in salary.

Following the sale of Boss Auto Glass Distributors to the new corporation, Mr. Fisher received approximately the same salary and entered into a three-year employment contract with Boss Holding Corp. There were essentially the same personnel in the predecessor corporation as in Boss Holding Corp., including the same branch managers and number of employees, i.e., 65.

Mr. Fisher testified that there was one bookkeeping department for all divisions of Boss Holding Corp.

Mr. Fisher had some managerial duties with regard to his sales staff and had authority to hire and fire said staff. However, he never prepared or filed sales or income tax returns on behalf of the corporation. He did, however, concede that he had access to the financial records of the corporation.

Mr. Fisher was in the office on a day-to-day basis during the years in issue, retiring in January of 1989.

In a letter addressed "Dear Friends", dated February 24, 1989, on Boss Glass Industries, Inc. stationery, noting an address of 321 Change Bridge Road, Pine Brook, New Jersey 07058, the same address as Boss Holding Corp., Mr. Fisher announced his retirement. In the fifth paragraph of said letter, Mr. Fisher noted that:

"I take comfort in knowing that I have helped build Boss Glass as a leader in the glass industry and I feel secure in the knowledge that I am leaving behind a

competent management team to guide its future and serve your needs."

Additionally, in the first paragraph of said letter, Mr. Fisher notes that he had spent "30 [years] with Boss Glass".

Jerry Fisher was listed on the Federal income tax return for Boss Holding Corp., Form 1120, as an officer of the corporation in either fiscal year ended January 31, 1986 or January 30, 1987. His title was listed as executive vice-president, receiving compensation in the sum of \$117,216.00.

Additionally, in a sales tax examination questionnaire sent to Boss Glass Distributors of Long Island, Inc., which listed its business address as 321 Change Bridge Road, Pine Brook, New Jersey 07045, filed by its bookkeeper, Young Ahn, Mr. Fisher was listed by the corporation as its vice-president during the period March 1, 1985 through November 30, 1987.

Matter of Bernard Myers

Mr. Myers was also a principal in the predecessor corporation, Boss Auto Glass Distributors, and its branch offices in both New York and New Jersey. He held the office of president and agreed to hold over with the new corporation, Boss Glass Industries, until a new president could be groomed for the job. Mr. Myers testified that this position only lasted three months, between June of 1984 and September of 1984. In an affidavit filed by Michael Gibbs, Mr. Gibbs states that Mr. Myers agreed to serve as president of the corporation from June of 1984 through the early part of 1985 and that Mr. Myers resigned as president not later than May of 1985. Mr. Gibbs also stated, as was corroborated by the testimony of Mr. Myers, that Mr. Stephen Smith, now deceased, succeeded him as president of the corporation.

Mr. Myers testified that the predecessor corporation, Boss Auto Glass Distributors, Inc., sold its assets to a new corporation called Boss Glass Industries, Inc., a Delaware corporation whose majority stockholder was Page Mill Intercapital Corporation, another Delaware corporation of which Mr. Michael Gibbs was president.

Mr. Myers conceded that he was authorized to sign checks on behalf of the corporation and that he was essentially in charge of the manufacturing operations, including deliveries,

cutting of glass and assembly. He also was in charge of ordering supplies from various vendors which included routinely signing invoices and making orders, and testified that other signatories authorized to sign checks on behalf of the corporation were Mr. Fisher, Mr. Yagud, Mr. Gibbs and Mr. Smith.

Mr. Myers stated that he always took orders from either Mr. Gibbs or the other chief executive officers, whom he believed to be Mr. Stephen Smith or Mr. Don Rosencotter.

Although not directly involved in the finances of the corporation, Mr. Myers admitted that he did have access to the books and records of the corporation. He testified that he never prepared tax returns or had occasion to review them.

Mr. Myers indicated that he began the predecessor corporation, Boss Auto Glass Distributors, Inc., in 1949 or 1950 with his background as a glazier. He continues to work for Boss Glass Industries, Inc. to the present day and is a member of its board of directors.

Mr. Myers' name appears as an officer of Boss Holding Corp. on its Federal income tax return, Form 1120, for either the year 1985 or 1986 (fiscal year ending January 31, 1986 or January 30, 1987) with a salary of \$120,016.00. He was also listed as a vice-president in the questionnaire provided by bookkeeper, Young Ahn, of Boss Glass Distributors of Long Island, Inc. for the period March 1, 1985 through November 30, 1987.

#### Matter of Everett Yagud

Mr. Yagud was the last of the principals in the predecessor corporation, Boss Auto Glass Distributors, which sold its assets to Boss Glass Industries, Inc., purportedly a Delaware corporation in which Page Mill Intercapital Corporation, Mr. Gibbs' corporation, held a majority stock interest. Mr. Yagud, as part of the sale, accepted a three-year employment contract with Boss Glass Industries, Inc. which terminated on June 30, 1987.

Mr. Yagud had responsibility for the operations of the main branch of Boss Glass Industries, Inc. in Pine Brook, New Jersey, as well as other branches in Pleasantville, New York, Babylon, New York and Wall, New Jersey. His responsibilities grew to include the installation, maintenance and running of an insulated line of glass products. With more of his

time taken up by the insulated glass product line, Mr. Yagud assigned or delegated his responsibilities for the branches and the purchasing of materials to others while he concentrated on the start-up of the insulated product line.

Mr. Yagud periodically sent letters to the trade indicating that tax resale certificates were required in dealing with Boss Glass Industries for both the State of New York and the State of New Jersey.

Mr. Yagud denied any responsibility in the area of sales and marketing after the sale of Boss Auto Glass Distributors in June of 1984. He claims that he had no contact with customers or with obtaining any tax resale certificates.

Mr. Yagud submitted various W-2 forms which were submitted with his tax returns for the years 1984, 1985, 1986 and 1987, noting that he received them from a company called Boss Glass Industries, not Boss Holding Corp. For the year 1987, Mr. Yagud's W-2 (Wage and Tax Statement) from Boss Glass Industries indicated taxable wages and tips of \$39,150.00. It is noted that the employer's identification number on said W-2 was 22-2536737, the same employer identification number used by Boss Holding Corp. The W-2s for 1986, listing aggregate wages of \$75,089.00, also indicate the same employer identification number on two separate W-2s. For the year 1985, the W-2 issued by Boss Glass Industries, again using the same employer identification number as Boss Holding Corp., indicated wages of \$85,000.00.

Mr. Yagud was also a signatory on the corporate checking account and was listed on Boss Holding Corp.'s income tax return for either the fiscal year ended January 31, 1985 or January 31, 1986 as a vice-president with compensation of \$74,400.00.

Between October 20, 1989 and September 28, 1990, Boss Glass Industries, Inc. of Change Bridge Road, Pine Brook, New Jersey 07058 made nine equal payments of \$47,000.00 to the New York State Department of Taxation and Finance. With regard to these payments, in the record is a September 20, 1989 letter from Mr. William Horn, director of finance of Boss Glass Industries, Inc., indicating that an enclosed check for \$47,000.00 represented 1/12th of the total combined estimated tax assessment and penalty for Boss Glass Industries (ID #22-2536737

[same as Boss Holding Corp.]) and WSS Glass Corp. (formerly Insulpane Industries, Inc. [ID #14-1560266]). Additionally, a Deferred Payment Agreement/Income Execution, dated November 3, 1989, indicates that an agreement had been reached between the Division and WSS Glass (formerly Insulpane Industries, Inc.) whereby Mr. Horn agreed, on behalf of WSS Glass, to pay to the Division \$410,749.08 representing estimated total liability on assessments issued to Insulpane Industries (ID #14-1560266).

### CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Article 28 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as:

"any officer, director or employee of a corporation...who as such officer, director or employee is under a duty to act for such corporation...in complying with any requirement of [Article 28]" (Tax Law § 1131[1]) (emphasis added).

The determination of whether an individual is a person required to collect tax depends upon the particular facts of each case (Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Vogel v. New York State Dept. of Taxation and Finance, 98 Misc 2d 222, 413 NYS2d 862; Matter of Zefania Baumvoll, Tax Appeals Tribunal, November 22, 1989; Matter of Frank S. Constantino, Officer of Jordan Elevator Co., Inc., Tax Appeals Tribunal, September 27, 1990).

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. A variety of factors must be weighed in determining the responsibility of any particular individual. Some of these factors include the individual's status as an officer, director, shareholder or employee; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; and the individual's economic interests in the corporation (Cohen v. State Tax Commn., supra, 513 NYS2d at 565; Blodnick v. State Tax Commn., 124 AD2d 437, 507



NYS2d 536, 538, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Vogel v. New York State Dept. of Taxation and Finance, supra, 413 NYS2d at 865). The holding of corporate office does not, however, in and of itself, impose liability (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427).

Applying these criteria to the circumstances which present themselves in the instant matters, it is found that petitioners were responsible officers or employees of Boss Holding Corp. or its alter ego Boss Glass Industries, Inc.

With regard to the corporate entities, there were at least four different accounts of the transition from Boss Auto Glass Distributors to Boss Glass Industries, Inc. The burden of proof in this matter rested on petitioners in accordance with the Tribunal's own regulations with regard to hearings before Administrative Law Judges (20 NYCRR 3000.10[d][4]). It was incumbent upon them to present a clear record from which facts could be adduced and conclusions drawn.

Given the entire record herein, it is most likely that Boss Auto Glass sold its assets to Boss Glass Distributors, Inc., whose majority shareholder was a company called Page Mill Intercapital Corp., of which Michael Gibbs was president. However, the business, including employees, of Boss Auto Glass as transacted prior to the sale of the business assets in June of 1984 remained almost identical before and after the sale. The three petitioners remained in their positions, Mr. Fisher in marketing, Mr. Myers in manufacturing and Mr. Yagud in management operations. They each had the ability to hire and fire employees; they each received substantial salaries from the corporation; they all worked for Boss Glass Distributors, Inc. on a daily basis with management responsibilities; they had the authority to sign checks on behalf of the corporation; and were listed on the Federal returns for Boss Holding Corp. as officers with substantial salaries. Mr. Fisher and Mr. Myers admitted meaningful access to the books and records of the corporation. It can only be inferred that Mr. Yagud had the same access.

None of the petitioners challenged the fact that he was an employee of Boss Glass Distributors, which had the same employer identification number as Boss Holding Corp.,

including the W-2 forms submitted by Mr. Yagud and the auditor's transcript of Boss Holding's 1120s for 1986 and 1987. Since the corporations involved did not keep accurate records with regard to which name and identification numbers were used for governmental filings, the Division's use of Boss Holding Corp. rather than Boss Glass Distributors, Inc. is a negligible error, if an error on its part at all.

The critical factor in determining that these three petitioners were responsible employees or officers of Boss Holding Corp. is that they were key employees with management roles in each of the major divisions of the corporation before and after the sale of assets from Boss Auto Glass Distributors, of which they were the principals, to Boss Glass Industries. It is probably true that corporate ownership changed as of 1984, but those essential characteristics of responsible officers or employees which attached to petitioners herein prior to 1984 did not dissipate after the sale of the assets. They were experienced in the industry and were key employees in the new corporation upon whom Michael Gibbs and the new corporation relied for survival.

This case presents somewhat of the converse situation found in Matter of Frank S. Constantino, Officer of Jordan Elevator Co., Inc. (supra). Therein, the Tribunal found that the petitioner's officer and shareholder status was offset by the circumstances relating to the control of the corporation. Constantino was found to lack the power to exercise the tax collection responsibilities on behalf of the corporation. Although petitioners herein denied involvement in the financial aspects of the business, they did not deny free access to the books and records of the corporation. In fact, this case is more like Blodnick v. State Tax Commn. (supra) where the responsibility rested with the corporate officers and shareholders because it was not possible to ascertain who else, if anyone, was in control and it appeared that the officers/shareholders had simply declined to exercise any responsibility with regard to the corporation.

It is noteworthy that the affidavit of Michael Gibbs submitted in evidence does not state ultimate responsibility for the financial affairs of Boss Glass Industries, Inc. and, none of petitioners herein identified anyone other than Michael Gibbs as a person who was responsible

for the financial affairs of the corporation. This lack of evidence can only be construed against petitioners. Each of the petitioners could have been informed with regard to the financial matters of the corporation, but chose not to be. It is noteworthy that each of them denied responsibility for the finances of the corporation, but none denied access to the records or that they simply delegated this duty to another department or individual.

It is noteworthy that petitioners' role in the corporation herein was not "minimal" and that petitioners could have taken actions to ensure that the taxes were paid. As stated above, their management roles, access to books and records, authority to hire and fire, authority to sign checks on behalf of the corporation, sign invoices and order supplies and their substantial income from the corporation, along with their daily contact with the day-to-day operations of the business, compel a finding that petitioners were in fact responsible officers or employees of Boss Holding Corp (cf., D & W Auto Service Center, Tax Appeals Tribunal, April 20, 1989 [where petitioner's "minimal" role did not excuse him from liability for sales taxes]).

B. With regard to the payments made by Boss Glass Industries, Inc. in nine equal installments of \$47,000.00, it appears that said payments were made pursuant to a deferred payment agreement with WSS Glass, formerly Insulpane Industries, Inc., and applied to assessment numbers which are unrelated to those in issue herein. Without any other evidence linking these nine payments made between October 20, 1989 and September 28, 1990 to the assessments herein, I can make no modifications in the amount of taxes due and owing from these petitioners.

C. Everett Yagud did present evidence, uncontradicted by the Division of Taxation, that his involvement with all of the Boss companies ended as of June 29, 1987, a fact partially corroborated by the reduced amount of compensation he received for that year reflected on his W-2 statements. Therefore, his liability for any taxes after that point is extinguished. The Division is directed to recompute the assessment against Mr. Yagud, cancelling all taxes assessed against him for all periods after June 29, 1987.

D. The petitions of Jerry Fisher and Bernard Myer are denied and the two notices of

determination and demands for payment of sales and use taxes due issued against both of these petitioners on February 28, 1989 are sustained as modified by the two notices of assessment review. The petition of Everett Yagud is granted to the extent set forth in Conclusion of Law "C" above, but in all other respects is denied, and the two notices of determination and demands for payment of sales and use taxes due dated February 28, 1989, as modified by the two notices of assessment review, are sustained.

DATED: Troy, New York  
July 23, 1992

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE